No. 10695

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOLTVILLE ICE AND COLD STORAGE COMPANY, ASSOCIATED FARMERS OF IMPERIAL COUNTY, AND HUGH T. OSBORNE, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondents pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U. S. C. 1940 ed., Title 29, Sec. 151, *et seq.*). This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, since the unfair labor practices occurred, and respondents transact business, within this judicial circuit.[1]

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 34–35.

STATEMENT OF THE CASE

Upon charges and amended charges filed by Truck Drivers, Warehousemen and Helpers Union 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. L., herein called the Union, and following the usual proceedings pursuant to Section 10 of the Act, which are fully set forth in the Board's decision (R. 47–50, 91–92), the Board, on July 22, 1943, issued its decision and order (R. 91–99, 46–90; 51 N. L. R. B. 596), which may briefly be summarized as follows:

1. *Identity and nature of business of respondents* (R. 50–53).—Respondent Holtville Ice and Cold Storage Company (hereinafter called the Ice Company) is a California corporation having its principal office and place of business in Holtville, Imperial Valley, California. It is engaged in the manufacture, sale, and distribution of ice, and also rents packing sheds to vegetable packers to whom it sells ice. Respondent Associated Farmers of Imperial County (hereinafter called the Associated Farmers) is a California nonprofit corporation composed of farmers, business and professional people of Imperial Valley, including the Ice Company. It was organized in 1936, at the time of "a series of disturbances * * * caused * * * by radical and/or communistic agitators" designed to create "so-called labor trouble amony (*sic*) the workers," and its avowed purposes are, *inter alia,* "to protect, preserve and maintain American Institutions and ideals; * * * and to promote and protect the economiec (*sic*) and agricultural welfare of the citizens of

the United States and particularly of the Citizens of California."[2] It has been instrumental in establishing a number of unaffiliated labor organizations among the employees of various business concerns in Imperial Valley. Respondent Hugh T. Osborne is, and has been since 1937, its secretary-manager.

2. *The unfair labor practices* (R. 53–80).—The Ice Company, and the Associated Farmers and Osborne, acting in its interest, questioned the employees of the Ice Company with respect to their union membership, discouraged adherence to the Union, and dominated, interfered with, and supported an unaffiliated labor organization styled the Holtville Ice and Cold Storage Company Employees Association (hereinafter called the Association). Respondents thereby committed unfair labor practices within the meaning of Section 8 (1) and (2) of the Act. The Ice Company also discriminated with respect to the hire and tenure of employment of 7 employees, in each instance because they applied for membership in the Union. The Ice Company thereby committed further unfair labor practices, within the meaning of Section 8 (1) and (3) of the Act.

3. *The Board's order* (R. 92–96).—The Board ordered the Ice Company to cease and desist from its unfair labor practices, to withdraw recognition from and completely disestablish the Association as the representative of any of its employees, to cease giving

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[2] The quotations are from the articles of incorporation of the organization and the annexed certificate of its secretary (Ass. Farmer's Exh. 1; R. 822, 825).

effect to any contracts with it, to offer reinstatement with back pay to the 7 employees against whom it had discriminated, and to post notices in its plant of compliance with the Board's order. The Board ordered the Associated Farmers and Osborne, when acting in the interest of the Ice Company or in the interest of any other employers, to cease and desist from their unfair labor practices, to refrain from soliciting and collecting funds from the Ice Company or from any other employer for use in interfering with the rights of employees guaranteed in Section 7 of the Act, and to mail to all members and contributors of the Associated Farmers notices of compliance with the provisions of the Board's order as to them.

SUMMARY OF ARGUMENT

I. The Act is applicable to the operations of the Ice Company.

II. The Board's findings of fact are supported by substantial evidence. Upon these facts respondents have engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act and the Ice Company has also engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.

III. The Board's order is valid.

ARGUMENT

Point I

The Act is applicable to the operations of the Ice Company

The Ice Company is engaged in the manufacture, sale, and distribution of ice (R. 137), of which it

produces about 45,000 tons annually (R. 450). Substantially all of this ice is sold to vegetable packers of Imperial Valley, California, under contractual arrangements whereby the Ice Company supplies the packers with packing sheds and railroad sidings which it owns, and the packers in turn purchase from the Ice Company all of their ice requirements (R. 142–144, 161–163).[3] The packers use the ice to pack their vegetables in crates and to refrigerate railroad cars in which the vegetables are shipped (R. 145–147). During each of the years 1941 and 1942, the packers thus refrigerated approximately 2,800 railroad cars, over 75 percent of which were used to carry the packers' produce to points outside the State of California (*ibid.*).

Upon the foregoing facts, we submit, the applicability of the Act to the Ice Company's operations is clear under well settled principles. It is plain that a stoppage of the Ice Company's operations by industrial strife would substantially interfere with or interrupt the interstate movement of the large quantities of produce of the vegetable packers who use the Ice Company's ice and packing sheds in connection with their shipments. Accordingly, such stoppage would affect commerce within the meaning of the Act, and the test of the Board's jurisdiction, announced in

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[3] During 1941 and 1942, the Ice Company's yearly sales of ice were $111,387 and $139,339, respectively, of which the sales to the packers totalled $110,460 and $138,342 (Bd. Exhs. 2A, 2B, 3A, 3B; R. 139–143). The remaining ice was sold to domestic users (R. 450–451).

N. L. R. B. v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41, 42, 43, is fully met. See, also, *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 220–221; *N. L. R. B.* v. *Bank of America National Trust & Savings Association*, 130 F. (2d) 624, 626 (C. C. A. 9), cert. denied 318 U. S. 791, 792. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, 125. It is immaterial that the Ice Company's sales are completed within the State of California,[4] or that other sources may be available to supply the packers' needs if the Ice Company's operations are interrupted.[5]

Point II

The Board's findings of fact are supported by substantial evidence. Upon these facts respondents have engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act and the Ice Company has also engaged in unfair labor practices within the meaning of Section 8 (3) of the Act

A. The violations of Section 8 (1) and (2) of the Act

On the evening of September 26, 1941, 11 of the Ice Company's employees visited the offices of the Union in El Centro, California, and signed applications for

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[4] *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9); *N. L. R. B.* v. *Cleveland Cliffs Iron Co.*, 133 F. (2d) 295, 299–300 (C. C. A. 6); *N. L. R. B.* v. *Henry Levaur, Inc.*, 115 F. (2d) 105, 108–109 (C. C. A. 1). See, also, *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453, 463; *N. L. R. B.* v. *Baltimore Transit Co.*, 140 F. (2d) 51 (C. C. A. 4), cert. denied 64 S. Ct. 848.

[5] *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 326; the *Bank of America* case, *supra; North Whittier Heights Citrus Association* v. *N. L. R. B.*, 109 F. (2d) 76, 82 (C. C. A. 9), cert. denied 310 U. S. 632.

membership (R. 239–244, 284–289, 402–405).[6] The following morning, Office Manager Herman Smith[7] of the Ice Company called employee L. H. Davis to his office and asked him what he knew about the men's joining the Union (R. 424). Davis answered that he knew of the meeting the night before, to which he had been invited, that he had not attended because of a previous engagement, that he had heard that some of the men had joined the Union, and that he did not know how many or who they were (*ibid.*).[8] The same day or a few days later, Plant Superintendent Pete Pool (R. 172, 566) also questioned a number of employees, including his brother, Herman, Perry Blank-

[6] The Ice Company manufactures ice only between November 1 and the following July (R. 155–157). During the 1940–41 manufacturing season, its staff increased with its volume of business from 20 on November 1 to 35 in the middle of May, and then receded to 25 at the end of the season in July (Bd. Exhs. 10, 25, 28; R. 600–601, 839–840, 844–845). During the slack period, the Ice Company customarily retained as many men as possible for maintenance work about the plant in order to keep a crew together for the resumption of operations in the fall (R. 451, 523). All of the men who had worked throughout the previous season were regarded by the Ice Company as "normal, regular employees," however, whether or not they were actually retained during the slack period (R. 520, 600–601; Bd. Exh. 10), and it was the practice to recall them when the season started, if their work was satisfactory (R. 399, 452–453). Ten of the 11 men who joined the Union, as stated in the text, were then working at the plant on "made" work, principally for contractors who were then installing electric motors to replace 6 Diesel engines (R. 156, 164–165, 190–191, 523–526; Company Exh. 6; R. 635).

[7] Smith is also secretary-treasurer of the Ice Company (R. 137, 615).

[8] Davis applied for membership in the Union on October 3 (R. 286, 421–422).

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enship, Henry Fredenburg, and Lester O. Hart, as to their union membership (R. 612–613, 274–275, 374–375, 572, 409). Herman Pool, Blankenship, Fredenburg, and Hart were among the 11 who had joined the Union on September 26 (R. 284–289, 402–405). During these conversations Pool told Hart that President Willard of the Ice Company (R. 137, 147) was "sure mad" because the men had joined the Union (R. 409, 578), he warned Blankenship that the Union "didn't have a chance" because the men who did the hiring were "a jump ahead of the unions" (R. 374–375, 572), and he admonished Herman Pool that he did not think the latter's joining the Union was "a very good idea" and that Willard could get "plenty of nonunion men" to operate the plant (R. 244–246). At least Herman Pool, Blankenship, and Fredenburg admitted that they had joined the Union (R. 612–613, 248, 274, 373–374, 572).

Following his conversations with the men, Superintendent Pool reported to President Willard that the plant had "gone union" (R. 534, 558, 614). Willard thereupon notified Secretary-Manager Osborne of the Associated Farmers by telephone that there were "some union activities around the plant," and asked him if he knew of them and what Willard should do about it (R. 168–169, 197, 478–479, 514, 534). Osborne's official duties required him, *inter alia;* to keep the members of the Associated Farmers "advised" with respect to "organizational efforts occurring among employees" (R. 214), and he assured Willard that he knew "all about" the union movement. He ad-

vised Willard to do nothing, and promised to see him shortly (R. 168–169, 197, 478–479, 514, 534).

Osborne visited Willard a few days later (R. 169–170). Willard again told Osborne of the "disturbance in his working force," referring to the union activities, and asked what Willard's "position" was and what the latter "could do about it" (R. 220, 170, 198, 535). Osborne replied in substance that the American Federation of Labor had been making "special" efforts for some time to organize the employees of ice companies in Imperial Valley, that there was nothing Willard could do without violating the National Labor Relations Act, but that the Associated Farmers was "working on the general situation [to] see it didn't get out of hand" (R. 170, 198, 220, 535).[9] He also discussed with Willard the formation of an unaffiliated union and told Willard in effect that another local concern had had similar labor "difficulties," which had been resolved by the employees organizing "their own union" (R. 198–199). Willard requested Osborne to "interest" himself in the Ice Company's "situation," and Osborne promised to make an "investigation" (R. 221–222). Shortly thereafter, Willard also conferred with R. B. Whitelaw, attorney for the Associated Farmers, concerning the "disturbance" at the plant (R. 546–548).

Within a few days after his talk with Willard, Osborne "contacted" several of the Ice Company's em-

[9] It was admittedly the policy and practice of the Associated Farmers to support and organize unaffiliated employee organizations as opposed to affiliated unions (R. 210–213).

ployees, including some who had joined the Union, questioned them as to their reasons for joining, suggested to some of them that they form an unaffiliated organization, and told them to see Whitelaw for legal advice and assistance (R. 223–224, 231–232, 291–293, 329–332, 425–428, 713). In his conversation with Herman Pool, Osborne warned that he was not "going to let you bring the Union into the Valley", presented arguments against union membership, and advised Pool, "If you are not too far in, think it over and back out" (R. 249–251). To Davis, who opposed Osborne's suggestion that the men form an unaffiliated organization, on the ground that such a union would be ineffective, Osborne declared that the Associated Farmers opposed organized labor because it "meant" a closed shop, which was un-American, and stated that Willard would close the Ice Company's plant rather than deal with the Union (R. 428).[10] During his talks with Herring and Harlan, who indicated that they opposed the Union and preferred an unaffiliated organization,[11] Osborne promised to help a movement to form such an association and agreed to supply Harlan with a copy of the governing rules of an "inside" union (R. 226, 292–293, 331, 693–694). At Osborne's suggestion, as the Board found (R. 59), Director Metz of the Association Farmers likewise sought out

[10] Osborne prefaced the latter threat with the statement that Willard had not talked to him about "this case, * * * personally" (R. 428).

[11] Herring was one of the 12 who had joined the Union (R. 403–405; 685); Harlan had not (R. 292).

an employee, Henry G. Miller, to whom he stated that it would not "pay" him to join the Union, that it would impair Miller's credit as a landowner, and that Willard would welcome, and the Associated Farmers would assist, the employees' formation of a union of "their own" (R. 360–362).[12] He urged Miller to speak to Osborne concerning the matter (R. 362).[13] Following his "investigation," Osborne made a report to Willard and assured him that the employees were "still loyal" to him (R. 227–228).

Following Osborne's conversations with the employees, several of them, including Harlan, Herring, and M. K. Stout, called upon the Associated Farmers' attorney, Whitelaw, for legal advice and assistance in forming an unaffiliated organization (R. 713–714, 779–780, 812–815). Whitelaw discussed the matter with them and supplied them with a copy of the constitution of such an association at another local plant (*ibid.*).[14] Whitelaw's secretary then prepared a constitution for the Association, which was in the exact verbiage of the model (R. 812–815, cf., Emp. Assn.

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[12] Miller had, in fact, already joined the Union (R. 288).

[13] There was no direct evidence that Metz acted at Osborne's suggestion but the Board's inference that Metz talked to Miller at Osborne's behest was entirely reasonable, we submit, in view of the nature of Metz's remarks to Miller and Osborne's concurrent activities.

[14] This organization was the Cramer Baking Company Employees Association (Emp. Assn. Exh. 3; R. 762–765), to which Osborne apparently had referred in his conversation with Whitelaw when discussing the solution for "labor difficulties" which had been employed by another local concern (*supra*, p. 9).

Exhs. 2 and 3; R. 762–765, 791–794).[15] Subsequently, a group of employees, including the same three who had called on Whitelaw and also several other employees, held a meeting at Harlan's home (R. 229–232, 297–299, 332–333, 698–700, 724–726, 745, 775–776). Osborne attended this meeting and instructed the men concerning the procedure for completing the organization of the Association and the conduct of its business (*ibid.*).

Meanwhile, on October 12, the Union's representatives called at the Ice Company's plant and, in the absence of President Willard, left a proposed form of contract with Office Manager Smith (R. 351–355, 860–864). On October 28, the Union's representatives again called at the plant, and saw Willard. They advised him that the Union was the designated bargaining representative of the majority of the employees, and asked him to negotiate with them on the basis of the previously submitted proposed contract (*ibid.*). Willard replied that he had not read the proposed agreement and that he could not act upon it until he had consulted the Ice Company's board of directors (R. 351–355, 506–508, 561–562, 860–864).

On October 29, the Ice Company resumed its regular operations after the summer slack season.[16] The following day, the Association was formally organized at a meeting held in Stout's home (R. 746–750). Only Harlan, Herring, Stout, Drinkard, and two other employees attended, and this small group elected Har-

[15] Whitelaw's secretary inadvertently omitted one line from the copy (R. 812–815).

[16] See note 6, p. 7, *supra.*

lan president, Herring vice president, and Stout secretary-treasurer (*ibid.*). The three named officers, Drinkard, and one other employee were designated to serve as a bargaining committee (*ibid.*). A proposed new wage scale and other objectives were discussed, and the bargaining committee was instructed to negotiate with the Ice Company (*ibid.*).

Shortly thereafter, the committee called on Willard for bargaining purposes (R. 482–483).[17] Osborne accompanied the committee, introduced them to Willard, and stated that they desired to bargain (R. 233, 483, 538–539, 702, 726–727). Despite the Union's recent claim that it represented the majority, Willard did not request the Association to prove its representative status but at once agreed to bargain with it (R. 303–304, 539–540, 561, 731).[18]

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[17] The Board's finding (R. 60–61, footnote 4), on conflicting evidence, that this occurred after the Union's demand for recognition on October 28, referred to in the text, and not before, as respondents contended, is amply supported. Thus, the Association's minutes show that its bargaining committee was selected and instructed to negotiate with Willard, on October 30 (R. 746–750), and Harlan and Herring in their testimony placed the date of the committee's meeting with Willard as after the formal organization of the Association (R. 302, 304, 701). Moreover, Stout testified that the only negotiations of which he knew occurred after the plant resumed regular operations on October 29 (R. 186–187; Company Exh. 2; R. 188, 767). It is also noteworthy that Willard did not refer, during his meeting with the Union's representatives on October 28, to a rival claim to recognition by the Association. It is likely that he would have done so, however, if such a claim had previously been made to him. See also note 19, p. 14, *infra*.

[18] The record shows that 12 employees had joined the Association (Emp. Assn. Exhs. 2, 3; R. 756–765). This is the same number who had joined the Union (*supra*, p. 6; p. 7, note 8). The Board found (R. 64) that the appropriate unit consisted of all employees

Thereupon, Willard entered upon negotiations for a contract with the Association (R. 339, 509–510) without advising the Union of the fact or taking any affirmative action on the Union's request to bargain.[19] Whitelaw, attorney for the Associated Farmers, assisted in the preparation of several drafts of contract which the Association submitted to Willard (Company Exhs. 3, 7; R. 499–503, 487, 716–719, 800–807, 766). On or about November 25, 1941, a contract was entered into between the Ice Company and the Association which was antedated to November 1 (Bd. Exh. 5; R. 311–317, 337–340, 748, 798–799). The contract contained a clause, suggested by Whitelaw (Bd. Exh. 3; R. 502, 542), requiring every employee to become a member of the Association within 15 days after the commencement of his employment, and also a "dues check off" provision (Pars. 15, 16, Bd. Exh. 5; R. 315–316). This contract was renewed on November 1, 1942,

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whom the Ice Company customarily rehired for substantial periods in successive seasons. The record does not show the number of such employees. Accordingly, it is not clear whether or not the 12 constituted a majority in the unit. It is clear, however, that even if the Association were the majority designee, it could not possibly be said to be their free and uncoerced choice, in view of respondents' acts of interference against the Union and in support of the Association.

[19] On January 23, 1942, after the Union repeated its claim that it represented the majority (Bd. Exh. 9A; R. 357–358), and after charges were filed with the Board (R. 1–4), Willard advised it by letter that he rejected the claim because "all of our employees belong to a local union which we recognize as the bargaining agents and have made an agreement to that effect" (Bd. Exh. 9B; R. 358). This was Willard's first and only response to the Union's request for bargaining in October. (R. 37.)

for one year with an automatic renewal clause, subject to cancellation on 90 days' notice (Bd. Exh. 8; R. 319–326). It was still in effect at the time of the hearing before the Board.

Upon the foregoing facts the Board's findings (R. 56, 62, 84) that respondents have committed unfair labor practices within the meaning of Sections 8 (2) and 8 (1) of the Act, clearly are supported by substantial evidence.

Respondents Osborne and the Associated Farmers, acting at the request and in the interest of the Ice Company, directly participated in the formation and establishment of the Association as the bargaining agent of the Ice Company's employees. Cf., *N. L. R. B.* v. *Grower Shipper Vegetable Assn.*, 122 F. (2d) 368, 378 (C. C. A. 9); *N. L. R. B.* v. *Long Lake Lumber Co.*, 138 F. (2d) 363, 364–365 (C. C. A. 9); cf., also, *N. L. R. B.* v. *Taylor-Colquitt Co.*, 140 F. (2d) 92 (C. C. A. 4). The Ice Company quickly recognized it as the exclusive representative without inquiry into its right to such status, and in the face of the conflicting claim of the Union.[20] Thereafter, the Ice Company firmly entrenched the Association by granting it a form of closed shop and a check-off of dues. See *N. L. R. B.* v. *Pennsylvania Greyhound Lines,*

[20] A neutral employer, when faced with the conflicting representation claims of two rival unions, would not negotiate a contract with one of them until its right to recognition had been finally determined under the procedures set up under the Act. See *Elastic Stop Nut Corp.* v. *N. L. R. B.*, decided May 1, 1944 (C. C. A. 8).

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Inc., 303 U. S. 261, 267; *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 460–461.[21]

In these circumstances, as is well settled, the Association cannot function as the representative of employees for collective bargaining, contemplated by the Act. "When once it appears that management has had a hand in organizing, supporting or in any wise interfering or collaborating with an 'association' of employees, such an association may not be recognized as the free and voluntary association of employees called for in the act." *N. L. R. B.* v. *Brown Paper Mill Co., Inc.*, 108 F. (2d) 867, 871 (C. C. A. 5), cert. denied 310 U. S. 651; the *Pennsylvania Greyhound* case, *supra*, 303 U. S. 261, 268; *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 593 (C. C. A. 9); *N. L. R. B.* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94, 96–99 (C. C. A. 9).

The activities of President Willard of the Ice Company, Office Manager Smith, and Superintendent Pool, in questioning employees as to union membership, in disclosing hostility to the Union, and in suggesting in unmistakable terms that the Ice Company would discharge union adherents (*supra*, pp. 7–8), constituted interference with, and restraint and coercion of, the employees' exercise of their rights under the Act, and therefore violated Section 8 (1) of the Act. E. g., *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518; *International Association of Machinists* v. *N. L. R. B.*,

[21] See also *N. L. R. B.* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 617 (C. C. A. 3); *N. L. R. B.* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 252 (C. C. A. 8); *N. L. R. B.* v. *Rock Hill Printing & Finishing Co.*, 131 F. (2d) 171, 173 (C. C. A. 4).

311 U. S. 72, 76; the *Boswell* case, *supra,* 136 F. (2d) 585, 590 (C. C. A. 9); *N. L. R. B.* v. *Polson Logging Co.,* 136 F. (2d) 314 (C. C. A. 9).

B. The violations of Section 8 (3) and (1) of the Act

The Board found (R. 84) that the Ice Company, in violation of Section 8 (3) and (1) of the Act, discriminated with respect to the hire and tenure of employment of employees Herman T. Pool (R. 69), Lester C. Hart (R. 75), Herman Fruhn (R. 72), Arthur Standifer (R. 76), Perry T. Blankenship (R. 77–78), Henry C. Fredenburg (R. 78), and Leroy H. Davis (R. 71) because they had applied for membership in the Union. We submit that this finding, likewise, is amply supported by substantial evidence, and is therefore entitled to acceptance by the Court.

All of the men in question had been "regular" employees of the Ice Company throughout the 1940–1941 season (R. 520, 587–589, 664–668; Bd. Exhs. 10–14, inclusive, 20–28, inclusive; R. 600–601, 643–651, 832–845; Company Exh. 1A; R. 182–183), and were engaged in "made" work at the plant during the following slack season (*supra,* note 6, p. 7). Many of them had long records of satisfactory service in the Company's employ.[22] Davis applied for membership

[22] Pool had worked for the Company for short periods in 1929 and 1931, and regularly since 1935 (R. 234–238). Hart was hired in 1926 and was the Company's oldest employee in point of service (R. 400–401); he had experience on a variety of jobs, all of which he admittedly performed in satisfactory fashion (R. 400–401, 461). Fruhn was hired in 1929 (R. 381); Standifer in January 1936 (R. 391); Blankenship in May 1940 (Tr. 426–427); Fredenburg in 1937 (R. 269); and Davis in 1932 (R. 420).

in the Union on October 3, 1941 (R. 286, 421–422), and the others on September 26 (R. 242, 253–254, 284–289, 403–405). Pool, Hart, Blankenship, Fredenburg, and Davis were questioned by Office Manager Smith, Superintendent Pete Pool, or Osborne, as to the Union's activities and the identity of the applicants for membership (*supra,* pp. 7–8, 10). During these conversations, as has been noted (*ibid.*), it was made clear to the men that the Ice Company was opposed to the Union, and that membership in it carried at least the risk of discharge.[23]

Nevertheless, these seven employees persisted in their adherence to the Union. When the ice plant resumed normal operations on October 29, 1941, they were the only men on the Ice Company's "regular" staff who remained loyal to the organization, all of the others who had joined having either quit the company's employ or transferred their loyalty to the newly-formed Association.[24] The seven in question

[23] Thus, Pool was warned by his brother, Superintendent Pool, that the Company could operate the plant with nonunion labor, and was strongly urged by Osborne to withdraw from the Union (*supra*, pp. 8, 10). Hart was informed by Superintendent Pool that Willard was "sure mad" because the employees had joined the Union (*ibid.*). Blankenship was told that the Union "didn't have a chance" because the men who did all the Company's hiring were "a jump ahead of the unions" (*ibid.*). And Davis was warned by Osborne that the Ice Company would close its plant rather than deal with the American Federation of Labor (*ibid.*). In addition, Herman Pool was told by his brother at the time of his dismissal that in adhering to the Union, he was riding "a blank train" (R. 248).

[24] As has been noted (*supra*, p. 6; p. 7, note 8), 12 men in all applied for membership in the Union, including the 7 men here involved. Of the remaining 5, two (Henry Miller and Bailey

were the only working men who, although available, were not restored to the Ice Company's employment.[25]

We submit that these circumstances, in themselves, raise a fair inference that the men lost their jobs because of their continued union adherence in the face of their employer's opposition. This inference is reinforced by the unconvincing nature of the explanations which the Ice Company offered the Board in an attempt to justify the dismissals on a lawful basis.

The Ice Company claimed, *inter alia,* that the substitution of electric power for Diesel engines, to which reference has been made (note 6, p. 7, *supra*), resulted in the elimination of seven jobs (R. 568, 603).[26] But this fact, even if true, obviously does not explain away the significant circumstance that the seven men chosen for elimination from the Ice Company's employ were the only remaining unregenerate union adherents. Moreover, the record shows that

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Pool) quit the Ice Company's employ before the new season started (R. 363–364, 582, 874–876), and 3 (Tom Herring, M. K. Stout, and Pete Drinkard) abandoned the Union to become leaders of the Association (*supra*, pp. 11–12, 12–13).

[25] Cf. Bd. Exh. 10 (R. 600–601) with Company Exh. 2 (R. 188). Herring's name does not appear on Company Exh. 2, but the record shows that he was in fact in the Ice Company's employ at this time (Tr. 573, 879). Henry Miller, E. J. Jones, M. Wooldridge, Bailey Pool, and E. Broderick, whose names appear on Bd. Exh. 10 but not on Company Exh. 2, voluntarily quit the Ice Company's employ before the new season began (Bd. Exh. 39; R. 859, 363–364, 582, 874–876).

[26] In his testimony, Willard spoke of the elimination of eight jobs, but he enumerated only seven (R. 454), and reference to the Ice Company's pay rolls shows at most seven (Bd. Exhs. 10–14, 20–28, both incl.; R. 600–601, 643–651, 832–845; Company Exh. 1A; R. 182–183; Company Exh. 2; R. 188).

the substitution of electric for Diesel power eliminated at most the jobs of four engineers, two engine maintenance men, and one crane operator (R. 568, 603; cf. Bd. Exh. 10, R. 600–601 and Company Exh. 2, R. 188; see also note 26, *supra*). Of the seven men dismissed, Pool was an engineer (R. 236–237, Bd. Exh. 10, R. 600–601), Hart was an engine maintenance man (R. 401), Fruhn, Standifer, and Blankenship were crane operators (Bd. Exh. 10; R. 600–601), Fredenburg worked as a truck driver and also as a laborer on the delivery platform (R. 270), and Davis assisted Officer Manager Smith and had charge of ice deliveries to the packing sheds (R. 421, 436–437, 616–617). It is clear, therefore, that the substitution could not possibly have been the basis for dismissal of two of the three crane operators involved, or of Fredenburg and Davis, all of whose jobs were unaffected by the change. Indeed, two inexperienced employees were transferred at this time to jobs as crane operators to the exclusion of Fruhn, Standifer, and Blankenship (Cf. Bd. Exh. 10, R. 600–601, with Resp. Exh. 2, R. 188).[27]

Furthermore, the record reveals that two of the four Diesel engineers employed by the Ice Company during the previous season, and one of the engine maintenance men, had voluntarily quit the Company's employ before the new season began, as had a storeroom worker and a truck driver (Bd. Exh. 39; R. 859,

[27] One of the two was Stout, an engineer, to whom reference has already been made as one of the organizers and leaders of the Association (*supra*, pp. 11, 12–13); the other was Gettle, a storeroom employee.

363–364, 582, 874–876; Bd. Exh. 10, R. 600–601). Thus, although seven jobs may have been eliminated by the change of power, it was necessary, at the most, to reduce the staff only by four in addition to the three who had quit, and even two of these four remaining separations from the staff could have been avoided by assigning the men whose jobs were abolished to the vacancies in the storeroom and among the truck drivers. That such transfers were not contrary to the company's practice is evidenced by the fact that Stout (see note 27, *supra*), the remaining engineer whose job was eliminated at this time, was transferred to crane operator.

Finally, the validity of this attempted explanation is conclusively rebutted by the fact that the record shows, as the Board found (R. 79), that "there appears to have been steady work from January 15, 1942, to July 15, 1942, for no fewer than five new men." Thus, it appears from the Ice Company's pay rolls for this period that it employed during each pay-roll period at least five and as many as 15 new men.[28] In

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[28] For the convenience of the Court, we set forth below a list of 31 new employees who were first hired by the Ice Company during the new season. At least 5 of these names appear on each pay roll for the period from January 15 to July 15, 1942 (Bd. Exhs. 16, 17, 29–38, incl.; R. 655–658, 846–857). Fifteen of the new men worked from May 15 to June 1, 1942 (Bd. Exh. 35; R. 853–854).

List of New Employees

Name	*First appearance on pay roll for semi-monthly period ending*
C. D. Allen	February 1, 1942 (Bd. Exh. 16; R. 655).
James Bedient	May 15, 1942 (Bd. Exh. 34; R. 852).
Raymond Bentley	May 15, 1942 (Bd. Exh. 34; R. 852).
R. S. Brixey	February 1, 1942 (Bd. Exh. 16; R. 655).
G. Daily	February 1, 1942 (Bd. Exh. 16; R. 655).

these circumstances, it is clear that the Ice Company's assertion that there was not enough work for all the "regular" employees from the preceding season, is belied by the facts.

In addition to the unsupportable reliance upon the elimination of certain jobs due to the change in the nature of its operations, the Ice Company pointed to various other circumstances as allegedly explaining the loss of employment of the seven men in question. However, these attempted explanations, likewise, are refuted by the record, as reference to the facts in the individual cases plainly shows.

LIST OF NEW EMPLOYEES—Continued

Name	*First appearance on pay roll for semi-monthly period ending*
Jake Dungan	May 15, 1942 (Bd. Exh. 34; R. 853).
Nathan Otis Edwards	March 15, 1942 (Bd. Exh. 30; R. 848)
Ted Eugster	May 15, 1942 (Bd. Exh. 33; R. 851).
W. Faulkner	February 1, 1942 (Bd. Exh. 16; R. 655).
Pearl Fauver	May 15, 1942 (Bd. Exh. 34; R. 852).
Cleo K. Green	May 1, 1942 (Bd. Exh. 33; R. 851).
James Green	July 1, 1942 (Bd. Exh. 37; R. 856).
Phillip Griffin	June 1, 1942 (Bd. Exh. 35; R. 853).
Delber Hall Guy	March 1, 1942 (Bd. Exh. 29; R. 847).
John Herron	May 15, 1942 (Bd. Exh. 34; R. 852).
A. Hensly	February 1, 1942 (Bd. Exh. 16; R. 655).
V. E. Henson	June 15, 1942 (Bd. Exh. 36; R. 855).
L. E. Hodges	February 1, 1942 (Bd. Exh. 16; R. 655).
Billy Allen Hogue	July 15, 1942 (Bd. Exh. 38; R. 857).
Harry Linker	May 15, 1942 (Bd. Exh. 34; R. 852).
Leroy Marlin	June 1, 1942 (Bd. Exh. 35; R. 853).
Manuel Mazon	June 1, 1942 (Bd. Exh. 35; R. 853).
Menno Simon Nickel	May 1, 1942 (Bd. Exh. 33; R. 851).
Sterling Paris	March 1, 1942 (Bd. Exh. 29; R. 847).
Francis Phillips	May 15, 1942 (Bd. Exh. 34; R. 853).
J. Raine	February 15, 1942 (Bd. Exh. 17; R. 657)
Joe Sigrist	June 1, 1942 (Bd. Exh. 35; R. 853).
William Starner	May 1, 1942 (Bd. Exh. 33; R. 851).
Oran Stephens	January 15, 1942 (Company Exh. 1B; R. 184).
Dorman Stewart	January 15, 1942 (Company Exh. 1B; R. 184).
Dorsey Williams	June 1, 1942 (Bd. Exh. 36; R. 855).

With respect to *Pool,* who was the superintendent's brother, the Company relied upon an alleged rule against employing relatives of supervisors (R. 247, 580). In support of this basis for the discharge, Willard testified that, a year before the dismissal occurred, some of the employees had complained to Office Manager Smith that the superintendent was showing favoritism for his brother (R. 468–470). It is significant, however, that Willard did not act on these alleged complaints until a year later, in October 1941, when for the first time he issued instructions to Superintendent Pool that relatives of supervisors were no longer to be employed (R. 470–471, 556). Thus, the rule against employment of relatives was suddenly put into effect when the superintendent's brother became a union member. The Ice Company did not explain the long delay in announcing the rule, and it does not appear that the alleged complaints of favoritism were ever repeated.

It is also significant that, as Willard admitted (R. 470–471, 556), he never investigated the complaints or even discussed them with anyone until October 1941. Moreover, neither Willard nor Smith named any of the complaining employees, and Superintendent Pool denied having favored his brother (R. 601–602). Finally, so far as appears, no other employees except Pool were affected by the alleged rule. It is understatement, we submit, to say that these facts afford rational basis for the inference that the rule was merely improvised to get rid of an undesirable union adherent.

With respect to *Pool, Blankenship, Fredenburg,* and *Standifer,* the Ice Company also asserted that they did not apply for reinstatement when the regular season resumed (R. 30, 32, 33). As has been noted, however (*supra,* note 6, p. 7), the record is clear that it was the practice to recall "regular" employees such as these men were, even though they did not apply. Moreover, the fact is that Blankenship (R. 376–379), Fredenburg (R. 276–278, 466), and Standifer (R. 394), asked Superintendent Pool, President Willard, or Office Manager Smith for work, but their requests were ignored.

The Ice Company further alleged before the Board (R. 30) that *Standifer* was dismissed when he finished the particular work on which he was engaged,[29] and, as President Willard testified, that although there was available other work which Standifer was capable of performing, Superintendent Pool selected more capable men (R. 455–456). The Board properly did not credit these attempted explanations (R. 75–76), either, for the record shows, contrary to the Company's assertion, that at the time he was dismissed, Standifer had started, but had not yet finished, painting the engine room (R. 397). And Willard's statement that Standifer was passed over for more capable men is not supported by any evidence in the record except Willard's bare assertion to such effect. Moreover, Standifer had worked for the Ice Company for over 5 years, and had over two years of experience as a crane operator (R. 391–392). It is hardly likely in these circumstances

[29] He was laid off on October 3, 1941 (R. 30).

that he was less apt than Stout and Gettle, who were assigned to crane operating but had no such experience whatever.[30]

A fuller statement of the facts seems necessary for an understanding of the remaining three cases. *Hart,* as has been noted (*supra,* note 22, p. 17), was employed by the Ice Company in 1926, and was its oldest employee in point of service (R. 400). He worked for a short time as a laborer, 2½ or 3 years as a crane operator, 2 or 2½ years as an engineer, and thereafter, until the beginning of the 1941–1942 season, as plant mechanic (R. 400–401). In all these jobs his services admittedly were satisfactory (R. 461).

On approximately October 15, he returned from a 2-week vacation (Tr. 493–494, 504). Superintendent Pool then told him that Willard had given instructions to lay "everybody" off "until further notice" (R. 405–506). Thereafter, at approximately weekly intervals, Hart asked Pool when he should return to work and was told at first that the superintendent had not received "any orders yet" and finally, after the plant had begun its fall operations, that the superintendent himself intended to perform the mechanical work in the plant (R. 406–407). The Ice Company regularly required two mechanics, but Hart was the only such craftsman in its employ at the time of his dismissal.[31]

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[30] It strains credulity that Standifer would have been permitted to work as a crane operator for over 2 years, if he were not at least reasonably efficient.

[31] Wooldridge, the other mechanic, had left the Company's employ during the slack season (Bd. Exhs. 10, 39; R. 600–601, 859).

The Ice Company contended (R. 30–31) that Hart was laid off because there was no longer any work for him due to the elimination of the Diesel engines. It appears, however, that at the time of his dismissal Hart was engaged in, but had not completed, the construction of an ice dump (R. 417). This work was later sent out for completion (R. 417–418). Moreover, Hart's work during the regular ice season generally included such tasks as building ice chutes, making crusher teeth for the ice machines in the sheds, and general repair work, all of which duties occupied approximately 75 percent of his working time and were in no way connected with the operation and maintenance of the Diesel engines (R. 401, 411, 418). It appears also that Hart's maintenance work required ability to handle electrical jobs since the Diesels were used to generate electric power (R. 175–176). There is no evidence that the amount of mechanical work had decreased at this time to such an extent that not even one mechanic was needed; indeed, the contrary is suggested, for the record shows that more mechanical work was available than Pool could do himself, and that much of it was sent out (R. 608–609). The Ice Company did not explain to the Board why it was suddenly decided to have this work done outside the plant.

Other circumstances likewise suggest that a lack of work was not the reason for Hart's discharge. We have already referred to the general availability of jobs other than those in the engine department, during the new season (*supra,* p. 21). Hart had considerable experience in most of the jobs about the plant,

including at least 2½ years as a crane operator, and had performed these jobs satisfactorily (*supra,* p. 25). Yet, although he repeatedly applied for work, the Ice Company ignored him, gave the crane operator jobs to nonunion men without experience, and during the season filled at least five other jobs with new men (*supra,* pp. 20, 21–22).

Fruhn worked regularly for the Ice Company as a crane operator from 1929 until the usual seasonal lay-off in July 1941 (R. 381). During that summer, the Ice Company arranged to have him work for the contractors engaged in the conversion of the plant to electric power, so that there would be a full staff intact for its fall operations (R. 389; *supra,* note 6, p. 7).

Following Fruhn's application for union membership on September 26, 1941, and both shortly before and after the plant reopened, Fruhn asked Superintendent Pool, Office Manager Smith, and President Willard for his old job and was repeatedly told that it was not yet time for him to return (R. 384–386). In the meantime, as we have already noted (*supra,* p. 20), two of the jobs as crane operators had been filled by Stout and Gettle, who had no experience at such work.

On about December 28, Fruhn was reemployed, but as a storeroom laborer. This was strenuous work, for which only strong men were suited (R. 386–387, 563, 626–629). Fruhn, as the Trial Examiner observed (R. 73), was a slight, thin man who, it was apparent, could not perform such labor. Fruhn was able to do the work for only 1 day (R. 386–387). He then asked Superintendent Pool to return him to his old job as

crane operator, but the superintendent ignored his request (R. 388). He thereupon quit the Ice Company's employ (R. 387).

The Ice Company admitted in its answer to the Board's complaint (R. 34), that Fruhn's work as a crane operator was satisfactory, but it contended at the hearing that he was not reinstated to that position because he had "tinkered" for years with the crane which he operated so that it required frequent adjustment (R. 474, 556–557). But Fruhn had operated cranes for the Ice Company for 11 years, and there was no testimony that either Pool or Willard had ever objected to the manner in which he handled a crane. Nor was he given this or any other reason for the refusal to return him to his regular job at the time. Under these circumstances it was almost mandatory upon the Board to reject, as it did (R. 72),[32]

[32] At the hearing, the Ice Company referred to its employment of Fruhn as a storeroom laborer as evidence of its nondiscriminatory attitude towards the union employees (R. 476–478). This argument is specious. As has been noted, the record establishes the Company's open hostility to the unionization of its employees (*supra*, p. 16), its clear refusal to continue the employ of any of the persistent union adherents (*supra*, pp. 18–19), and its otherwise inexplicable deprivation of Fruhn of the crane operator's job which he had held for 11 years (*supra*, p. 27). Against this background the Ice Company's employment of Fruhn as a storeroom laborer, a heavy job which he clearly could not perform, was merely additional persuasive evidence of the Ice Company's intention to discriminate against Fruhn as a union member.

Fruhn's final separation from the Ice Company's employ because he could not do the work discriminatorily assigned to him, was in no sense voluntary but rather the inevitable result of his employer's discrimination against him and thus the equivalent of

this explanation for the Ice Company's refusal to continue Fruhn as a crane operator.

Davis, who had been in the Ice Company's employ since 1932, had charge of the deliveries of ice to the packing sheds during the regular season (R. 420, 436–437, 616–618), and sold ice to customers from the Company's platform during the slack summer months (R. 438). He also assisted Office Manager Smith in the office (R. 420–421, 436–437, 616).

After he joined the Union on October 3, 1941, Osborne suggested to him that an unaffiliated union be formed by the employees (R. 292–293, 428). Davis replied that such an association would be ineffective, and stated that he had joined the Union and would remain a member until the majority of the employees abandoned it (R. 428). Osborne warned Davis that the Ice Company would close its plant rather than deal with the American Federation of Labor (*ibid.*).[33]

On October 16, he was informed by the office manager that although his work had been satisfactory, the Ice Company did not need his services at that time of year, that he could return around the first of the year, but that since there would be no more than 6

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a discriminatory discharge. See *N. L. R. B.* v. *Star Publishing Co.*, 97 F. (2d) 465, 468–471 (C. C. A. 9); *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 493–494 (C. C. A. 9), cert. den. 306 U. S. 643; *Clover Fork Coal Co.* v. *N. L. R. B.*, 97 F. (2d) 331 (C. C. A. 6).

[33] In light of the foregoing, the repeated questioning of employees as to the identity of union members, and the entire record, the Board properly did not credit the Ice Company's assertion that it did not know Davis was a member of the Union (R. 70).

or 7 months of work for him each year, it would be better if he secured a job "somewhere else" (R. 432–433).

The Ice Company claimed before the Board that Davis was released because of lack of work during the slack season and because of the Company's desire to cut down overhead (R. 31, 621–623). In support of the contention as to lack of work, Willard and Office Manager Smith testified that the former issued instructions to lay Davis off at the beginning of the 1941 slack season, in about July (R. 461–462, 550–551, 623–624). Willard further testified that he repeated these instructions to Smith on about September 20 (R. 462, 551). Davis, however, was in fact not discharged until almost a month later, when the slack season was nearing its close, regular operations were about to be resumed, and shortly after the union activities began. It seems unlikely that Davis should have been retained throughout the slack season in this fashion, if lack of work were the true reason for his dismissal.

Moreover, the record shows that Herring, vice president of the Association, and a new employee, Jack Garber, who was hired by the Ice Company on about September 1, 1941, have done Davis' work on the platform and in the office, respectively, since his dismissal (R. 434, 446, 463–465, 671–672). Herring's salary for his work on the platform exceeded that paid Davis (cf. R. 672–675 and 444–445); and Garber was retained throughout the following slack summer season (R. 555–556). In these circumstances, we submit, the

Board clearly was entitled to reject the reasons offered by the Ice Company for Davis' dismissal.

Recapitulation

In sum, the record shows that the seven men involved in this proceeding were the only union adherents remaining in the Ice Company's employ when the new ice season began. They were the only ones who, although available, failed to retain their jobs, all other available "regular" employees from the previous season being reinstated. The record shows, further, that the Ice Company strongly opposed dealing with the Union, and in various ways sought to discourage the employees' adherence to it and to instigate the formation of an unaffiliated union. Much of this anti-union conduct was specifically but unsuccessfully directed to several of the men involved herein. Finally the explanations upon which the Company relied to justify the dismissals on a lawful basis, were highly unconvincing and in some cases clearly untrue.

We submit that, under these circumstances, there was clearly rational basis for the Board's inference that the men in question lost their jobs because of their union affiliation.

Point III

The Board's order is valid

The provisions of the Board's order as to the Ice Company, requiring it to cease and desist from its unfair labor practices, to withdraw recognition from and disestablish the Association as the collective bargaining representative of the employees, to cease giving

effect to its contract with that organization, and to offer reinstatement with back pay to the employees discriminated against (R. 92–94), are the usual provisions upon the findings made. We respectfully suggest that their validity is so well settled and commonplace as not to warrant citation of decisions.

The Board further ordered that the Associated Farmers and Osborne cease and desist (1) from dominating, interfering with, or supporting the Association or any other labor organization of employees of the Ice Company or of other employers; (2) from soliciting and collecting funds from the Ice Company or any other employer to be used for the purpose of interfering with employees' rights under the Act; and (3) from in any other manner interfering with, restraining, or coercing the employees of the Ice Company or any other employer in the exercise of the rights guaranteed in Section 7 of the Act (R. 94–95). These provisions of the order are also warranted.

The record here shows, as the Board found (R. 52–53), that the Associated Farmers and Osborne, financially supported by the Ice Company and other employers, have regularly and as part of a deliberate policy, furnished information to members of the Associated Farmers concerning the "organizational activities" of their employees, have assisted and organized a number of employee-associations, and have opposed the efforts of affiliated unions to become the representatives of employees in Imperial Valley (R. 212, 214, 216–217). Moreover, the Associated Farmers' and Osborne's interference with the organizational activities

of the Ice Company's employees was undertaken as part of a current, general campaign by the Associated Farmers to "see [that the organizational activities of the Union in the Valley] didn't get out of hand" (R. 170). In these circumstances, it is manifest that the Board's order merely requires the Associated Farmers and Osborne to abandon the unlawful conduct which constituted the unfair labor practices found by the Board, and other like and related acts whose commission is fairly to be anticipated from the Associated Farmers' and Osborne's admitted activities in the past. Thus, the Board's order is clearly "adapted to the situation which calls for redress" (*N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348), and well within the Board's competence to make. *N. L. R. B.* v. *Express Publishing,* 312 U. S. 426, 436–437.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence and that its order is valid and proper and should be enforced.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

> SEC. 2. (2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly. * * *
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> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. * * *
>
> SEC. 10. (c) * * * If upon all the testi-

mony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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